GORDON H. SMITH GREGON

United States Senate

**WASHINGTON, DC 20510-3704** 

DUR 5/21/67

COMMITTEES
FINANCE

COMMERCE, SCIENCE, AND TRANSPORTATION ENERGY AND NATURAL RESOURCES INDIAN AFFAIRS

RANKING MEMBER, SPECIAL COMMITTEE ON AGING

May 2, 2007

Ms. Stephanie Daigle Associate Administrator, Congressional Affairs Environmental Protection Agency 1200 Pennsylvania Avenue, NW, Room 3426 Washington, DC 20460

Dear Ms. Daigle:

Mr. Robert Kerivan has written to me again regarding EPA enforcement actions against his business. I have enclosed a copy of this most recent correspondence for your information. Your consideration of this additional information would be appreciated.

After you have completed your review, please send your findings and comments to my Portland office at One World Trade Center, 121 SW Salmon, Suite 1250, Portland, Oregon 97204.

Thank you for your continuing attention to this inquiry

Sincerely,

Gordon H. Smith United States Senator

GHS:jsr Enclosure April 19, 2007

Senator Gordon Smith Washington DC

Dear Senator Smith,

Thank you for your letter of April 12, 2007 and enclosing a copy of the report from the EPA, signed by Elin D. Miller, Regional Administrator. However, the EPA and the Corps are up to their old tricks, giving you, the Senator, false information. In the last paragraph of their letter they state that Sucker Creek is a "continually flowing body of water". As I have lived next to this creek for 25 years, I know it goes dry every other year or so. They also state the Illinois River is a "navigable-in-fact body of water". That is not true as the Rogue River is navigable only from the ocean to the town of Agness, about 30 miles up river. After that point there are numerous waterfalls. The Illinois River flows into the Rogue River upriver from Agness and flows about forty miles or so upriver and rises to 1600-foot elevation before Sucker Creek enters the Illinois River. I have enclosed a copy of a list of navigable river that the Corps puts out and for which they are responsible. As you can see the Illinois River and Sucker Creek are not named among them, and the Corps does not feel they are responsible for the Illinois River or Sucker Creek in the Illinois Valley. It would be nice if they did help protect our waters, but when there is a flood they are all home hiding under their mothers' bed.

Now to explain, the work I had done was covered by a State Court injunction, issued against the Oregon Division of State Lands. The judge held court in the riverbed itself on my property and stated, "You would have to be a blind man not to see the damages the creek has caused the Kerivan property" and upheld the injunction to allow us to repair. We fixed the problem and it only took 11 man-hours, some riprap, cat work, and backhoe work. It made the DSL mad as the injunction said they could not interfere. So they turned us into the Corps and the EPA.

Then after the Raponas case the U.S. Supreme Court ruled the Corps does not have jurisdiction over non-navigable waters and adjacent wetlands. The EPA put out a memorandum of understanding two weeks after the U.S. Supreme Court ruled, that they would be sending out a new jurisdictional memorandum. That was over a year ago, but the EPA still has not expressed those rules as you can see in their letter.

All I have been asking of you, my U.S. Senator, was to force the EPA to accept the U.S. Supreme Court's decision or prove why the do not need to. But they have misled you with false information. I thought that no man or woman was above the law, but it looks like the EPA and the Corps are an exception.

Waiting for your reply.

Robert E. Keriyan

taking a position on the legal issue presented by the Supreme Court decision.



April 19, 2007

Honorable Gordon H. Smith United States Senate One World Trade Center 121 S.W. Salmon Street, Suite 1250 Portland, OR 97204

Re: In the Matter of Robert Kerivan and Bridgeview Vineyards, EPA Docket No. CWA-10-2005-0124

Dear Senator Smith:

Thank you for forwarding the Environmental Protection Agency' (EPA) letter dated March 27, 2007. I wish to make you aware of two errors in the EPA letter.

I do not wish to go through the history of EPA's harassment of my business and me due to the repairs we made to existing riprap on our vineyard to protect our vineyard roads. It is sufficient to note that the EPA ignored exemptions and general authorizations under the Clean Water Act (CWA). The exemptions they ignored are:

- 1. 33 USC 1344(f)(1) (the Farm Exemption Provisions) exempts road repair and maintenance and repair to damaged riprap from any permitting requirement; and
- 2. The general authorizations under 33 USC 1344(e) that expressly allows stream bank stabilization repairs, provided no more than 500 lineal feet of stream bank or more than 500 cubic yards of fill are involved. See Nationwide Authorization No. 13. Our repair involved 150 to 175 lineal feet, not more than 150 cubic yards of riprap (taken from excess riprap previously existing on the vineyard). This excess riprap was placed on the property when roughly 2,500 feet of diking and riprap was installed in the lat 1960s (some 14 years before I purchased the property) to prevent Sucker Creek from flooding the farm.

The reason I write this letter is because of the two erroneous statements on page 2 of EPA's letter. I request that you challenge these two inaccuracies on our behalf. I do so because EPA's continued course of conduct, which is to act contrary to the law, must be challenged.

I have read the *Rapanos* decision from the Supreme Court, had my lawyer's read it and I have attended a seminar on that decision.

That decision states that the Corps' and EPA's jurisdiction under the CWA is over "traditional navigable waters" (i.e., known as Section 10 waters under the Rivers and Harbors



Act) and wetlands adjacent to traditional navigable waters. The *Rapanos* decision rejected the agency's assertion that they have CWA authority over "remote waters" based on a hydrologic connection to traditional navigable waters.

The U.S. Army Corps of Engineers (the Corps) maintains a listing of "traditional navigable waters" in Oregon. I attach the most recent listing of traditional navigable waters as Exhibit A. Sucker Creek, which is the free flowing stream that flows by our vineyard and into the east fork of the Illinois River (approximately one mile downstream from our vineyard), is not listed. Neither is the east fork of Illinois River or the Illinois River listed as "traditional navigable waters" (Section 10 waters).

Yet, the Regional Administrator has represented to you in the March 27 letter (on page 2) that the Illinois River is "a navigable-in-fact body of water." This representation is erroneous. The Corps' listing of navigable waters ends on the Rogue River, at Agnes, Oregon (roughly 27 miles from the Pacific Ocean).

Under *Rapanos*, EPA's CWA jurisdiction does not extend to "remote waters" (whether wetlands or tributaries). Sucker Creek is a remote water located 47 miles from any traditional navigable water (the Rogue River at Agnes, Oregon) or any wetland adjacent to traditional navigable waters.

The EPA exceeded the extent of its jurisdiction under the CWA in grand fashion (by roughly 47 miles) when asserting I conducted activity in waters subject to the CWA and harassed me into paying \$11,000. It now is clear the EPA agents had no authority whatsoever under the law over Sucker Creek. In short, I was mugged by EPA.

The second misrepresentation by the Regional Administrator pertains to interim guidance issued by the Corps and EPA after the *Rapanos* decision. When I telephoned Ms. Hillsman, she indicated there was no such guidance issued. The Regional Administrator's March 27, 2007 letter to your office also so states there is no interim guidance.

My lawyers have provided me the attached e-mail which shows that interim guidance was issued by the Corps on July 5, 2006 (three weeks after the *Rapanos* decision).

I find it astonishing that the Regional Administrator of EPA has told your office there is no such guidance when such guidance exists.

The guidance clearly states that agency officials when dealing with areas other than "traditional navigable waters" are to avoid taking positions on CWA jurisdiction over remote waters because the *Rapanos* decision has limited the agencies' jurisdiction. Further, the July 5, 2006 guidance states that the agency personnel are not to take positions on jurisdiction over remote waters even in cases pending in court, and that no further enforcement referrals



should be made to the United States Department of Justice regarding CWA violations, unless they relate to "traditional navigable waters" (i.e., Section 10 waters).

As I stated earlier, I have been mugged by the EPA. Unless they can show your office where and when the Illinois River, which rises 1600-feet in elevation, became a "traditional navigable water" (i.e., a Section 10 water), they should admit their mistake and refund the \$11,000 they took from my company.

I thank you and your office staff for the kind help in making the initial inquiry to the EPA and hope that you will be persistent in following up on the EPA's erroneous statements. We need federal agencies to follow the law, and stop harassing innocent farmers who are merely conducting repairs on their lands to maintain the productivity of the same.

Sincerely,

Page 3 of 3

Robert Kerivan

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October 1993

NAXIGABLE RIVERWAYS WITHIN THE STATE OF OREGON..
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# NAVIGABLE RIVERWAYS WITHIN THE STATE OF OREGON - Portland District - Corps of Engineers

October 1993

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## NAVIGABLE RIVERWAYS WITHIN THE STATE OF OREGON Portland District - Corps of Engineers

October 1993 Authorized Project((Alies) Nevigable Laugh (Michae) Sandy River siting of Columbia River. Month seroes Columbia River from Comes, WA. Hend at Chown Point Highway bridge. Telestray of Wilemans Hour. Month 23 miles upon Santian River Salem, OR. Head as highway bridge at Jefferson, at mile \$44. tery of Mahasanda Chancal. Mouth 3 talkes south of St. Santoch Stough 1.4 Holesa, OR. Head at and of large count. Tribunsy of Unpops Heer. Month at Reedspart. OR. Hond at railreed examing at mile 5.3. Scholdeld Creek Plans into Pecific Ocean at Talk, US. Head of bay Q.5 mile downstream of Kensville, CR. Head of fivor at Coder Creek, siver Siletz River mile 22.6. Plous into Pacific Cosm 5 miles downstream from Ploston Head is 0.9 mile systems of Maylatan, indige at mile 20.6. Shelaw River 21.5 Singlew River, North Fork Tributary of Singles Street Month I min from Planner 43 at anoth of Linkbey Crask on right beat at ride 4.3.

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operation of county reed bridge at Woodren.

Sucker Creek not listed

## NAVIGABLE RIVERWAYS WITHIN THE STATE OF OREGON Pertland District - Corps of Englaster

October 1993

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Wilson River	3.9	Ness	Inherity of Tillimook Bay at Tillimook, CR. Hand at secoth of Better Creek.	
Windruck River	0.6	7	Tiliminy of Pecific Ocean Instructivity north of Oceanon California border. Head at US 101 tridge.	
Yachatz River	1.0	-	Trimutey of Fuellio Creas et Yachata, OR. Hand D.S. mile downstream of Salmon Creek et mile 1.3.	
Yambili River (doe on South Youthill R)	11.2	١	Tributary of Willeman's River Morth 20 thver miles above Oragos City looks: Mouth 20 thver miles above Gregos City Looks. Hand at confinence of sects and south fodos.	
Yaquina River	22.3	10.0	Plows lato Pucific Coups at Navapors, CR. Head of Say at Yaquins, OR. Hand of siver at 18th City beldge, selle 22.3.	
Youngs River	12.4		Thintary of Colombia River at Astoria, CR. Head of they and mouth of they at old US 101 betaps. Head of savigation at county road beings with 12.4.	

### † Head rates to best of savigations bandware ...

information consided in this table was obtained from a Public Notice issued 1 May 1983 satisfied "Declaration of Navigable Waters of the United States." Three civers, McKenzie, Powler, and States, were added to this table that were not included in the 1981 nodes.

Public Law 94-587 §154 (West Resources Development Act of 1976) Section 10 permits are act required to construct whereas and pines in a savigability in based solely on the identical use to insequent interactic consequence. Such historical envigable tenter extress in Oragos and Delay Creek, Orango Canal, South Yambill River, Yambill River (mile 7 to 11-3), Tunistic River, and Unoppe River (mile 25 (Scouring) to 12-23). The bilaterical envigability of tense sivers (and their referenced markes) in based on assected information and file information.

From: Sudol, Mark F HQg2 Sent: Wednesday, July 65, 2006 10:25 AM To: COL-REG-All; CDL-REG-CRIEFS; CDL-REG-MSC; CDM-REG-ROS CC: Bernes, Gorald W MOO2; Smith, Chip R MODA; Mood, Lance D HQo2; Stookdale, Rarl R HQD2; 'Sobmander, Craig R Nr OGC'; Dunlop, George S HQDA; Sherman, Remaie H HQO2; Cummings, Ellen N HQO2 Subject: Interin Guidance on the Rapanes and Caraball Supreme Court Decision

### Bveryone,

The Supreme Court handed down a decision on June 19, 2006, in the Rapanos and Carabell cases. That decision addresses the scope of Clean Water Act (CMA) jurisdiction over certain waters of the.
United States, including wetlands. I appreciate the difficulty you are facing in trying to been an on-going program functioning in the face of the present uncertainty. Given the confusion created by the differing opinions that the Supreme Court justices filed in that case, it will take some time for the Courps and the ERA to analyze and reach consensus on what legal guidance is to be derived from the decision. In the near future we intend to issue joint ERA/Army guidance clarifying CMA jurisdiction in light of the Espanos/Carabell decision.

We anticipate that the Rapanes/Carabell decision will lead the Corps and the EPA to make some changes in how we describe and document the justifications that underlie some of our CNA jurisdictional determinations (JDs). In other words, the tests that we cite and the facts that we document in some of our JD administrative records will probably change seasonst, to insure that our JDs reflect the Supreme Court's next recent legal tests for asserting CNA jurisdiction. He will try to send you car advice in this regard as soon as possible and in the very near future.

In the meantime, in order to allow the Corps and BPA to prepare and issue substantive guidance, I am recommending that, to the extent circumstances allow, you dalky making CWA jurisdictional determinations for areas boyond the limits of the traditional navigable waters (i.e., outside the "Section 10" waters) for the next three weeks. Even though you should dalay making CWA jurisdictional calls in areas outside the traditional navigable waters for the next three weeks; that does not mean that the processing and issuence of CWA parent authorisations in those areas using general parmits and standard individual permits should be delayed, as is further explained below.

I also recommend that, until that substantive guidance is circulated, no Corps District or Division Office should announce or implement any change in (1) how we are documenting our jurisdictional determinations, or (2) regarding the areas over which we are asserting CWA jurisdiction, without prior coordination with and concurrence by Headquarters Regulatory Community of Practice and Readquarters Office of the Chief Counsel.

404 permit covering activities outside the traditional navisable waters where permit issuance is feasible during the next few weeks, but where special conditions of the proffered permit would require the permittee to provide compensatory mitigation, and where that permittee might believe that some or all of his activities are now not subject to regulation under CMA Section 404 because of the Rapanos/Carabell decision, and thus that the mitigation requirements of the permit are expessive or unnocensary. In such a diroumstance the Corps should inform the permit applicant that he or she has a number of options, as follows: The parmit applicant can accept and sign the proffered permit now, with its excisting terms and conditions; or the permit applicant can ask for a delay in the issuance of the permit until the Corps District has received substantive Rapance/Carabell guidence from Corps Hendquarters, so that the amount of required compensatory mitigation can be re-evaluated (if appropriate) based on that new guidance.

For Corps CMA Section 404 permit authorizations made during the next few weeks for activities outside the traditional navigable waters pursuant to either a general permit or a standard individual permits, where the permittee later concludes that the terms or conditions of that parmit authorization are inappropriate in light of the Rapanos/Carabell decision, that permittee can ask the Corps to modify the terms or conditions of that permit to rectify the matter subsequent to the issuence of the anticipated EFA/Army substantive Rapanos/Carabell guidance.

Corps Headquarters POCs are Mark Sudol and Russ Raiser (Regulatory COP), Lance Wood (CCE), and, for litigation and enforcement matters, Martin Cohen (CCL).

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### BPA INTRAIN GUIDANCE

Initial Guidance on Supreme Court's Wetlands Decision

As you know, on June 19th the Supreme Court issued a decision in the consolidated wetlands cases. OGC, CBCA, and ON are studying the opinions and do not yot have an Agency position on them. In the vary near future, we intend to issue guidance on how the Agency should proceed in light of the decision. Until them, Agency personnal should not represent an Agency position on the effect of this decision on Clean Water Act jurisdiction in pleadings or in dealings with outside parties.

Therefore, in situations that require taking a position on the scope of "waters of the US" under the Clean Water Act, e.g. briefs of other filings in judicial or administrative proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in United States v. Cundiff, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st.

Ougoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require